No. 89-1432

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

vs.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Supremacy Clause of the United States Constitution and Sections 105 and 363 of the Bankruptcy Code, a Bankruptcy Court may enter an order agreed to by a debtor that specifies the use of a commissioner to take bids on the sale of real property of the debtor.

2. Whether the closing of the sale of the real property of a debtor pursuant to a procedure authorized by a Bankruptcy Court renders this appeal moot by virtue of §363(m) of the Bankruptcy Code.

3. Whether the sole general partner of a debtor, who suffered no loss, who lacks any ownership interest in real property and is not liable for loans secured thereby, has standing to collaterally attack the procedure for the sale of real estate that was agreed to by the debtor.

4. Whether the Court should exercise its authority under Sup. Ct. R. 23.1, notwithstanding the independent basis for the decision below in the substantive and procedural law of the State of Illinois.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's recitation of the applicable statutory and constitutional provisions is satisfactory except as set forth below:

11 U.S.C. §363 provides, in pertinent part:

§ 363. Use, sale, or lease of property.

[. . .]

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

[. . .]

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if --

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

[. . .]

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Illinois Revised Statute, ch. 110, ¶ 15-1506 (1987) provides, in pertinent part:

§ 15-1506. Judgment.

[. . .]

(f) Special Matters in Judgment. Without limiting the general authority and powers of the court, special matters may be included in the judgment of foreclosure if sought by a party in the complaint or by separate motion. Such matters may include, without limitation:

[. . .]

(3) an official or other person who shall be the officer to conduct the sale other than the one customarily designated by the court;

[. . .]

(6) the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale;

[. . .]

(14) such other matters as approved by the court to ensure sale of the real estate for the most commercially favorable price for the type of real estate involved.

(g) Agreement of the Parties. If all of the parties agree in writing on the minimum price and that the real estate may be sold to the first person who offers in writing to purchase the real estate for such price, and on such other commercially reasonable terms and conditions as the parties may agree, then the court shall order the real estate to be sold on such terms, subject to confirmation of the sale in accordance with Section 15-1508.

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STATEMENT OF THE CASE

Petitioner was the sole general partner of 29 East Madison Associates (the "Partnership"), an Illinois limited partnership that in turn had the power of direction over an Illinois land trust (the "Trust"). The Trust held legal title to the commercial office building and leased the land that was the subject of a mortgage foreclosure action (the "Property"). (C305). The Property was encumbered by three mortgage liens as of January 3, 1986. The first mortgage was held by respon-

dent Trustees of Central States, Southeast and Southwest Areas Pension Fund. (C03-04). Lincoln National Pension Insurance Company ("Lincoln") held the second mortgage. (C03). The third mortgage was held by respondent Transcontinental Realty Investors, a California business trust then known as Johnstown/Consolidated Realty Trust ("TRI"). (C90-111). These mortgages secured a principal amount of debt in excess of $12 million. (C610).

Following a default by the Partnership on its mortgage payments, respondents sued the Partnership in the Circuit Court of Cook County to foreclose their mortgage liens on the Property. (C02). On February 13, 1986, the Partnership stayed the suit by filing a voluntary petition under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Illinois.

On April 28, 1986, the Bankruptcy Court entered an agreed order (the "Agreed Order") that settled vigorous litigation by setting a procedure for the sale of the Property, which was the sole asset of the petitioner's Partnership. The owner of the land, the Trust that owned the building, counsel for petitioner's Partnership, which had a power of direction over the Trust, and counsel for the respondents all stipulated to the entry of the Agreed Order. (C467). The Agreed Order set the terms of an agreed order of foreclosure for the judicial sale of the Property. Before the judicial sale would be held, however, the petitioner's Partnership was given a grace period of several months in which to find a third-party purchaser for the Property. (C477). The Partnership failed to find a purchaser within the specified period of time.

On June 13, 1986, pursuant to the Agreed Order and an additional stipulation by the same parties, the Agreed Order for Judgment of Foreclosure (the "Foreclosure Order") was entered by the Circuit Court of Cook County. (C605). The Foreclosure Order and the Agreed Order called for the judicial sale of the Property on July 7, 1986. Pursuant to both the Agreed Order and the Foreclosure Order, the Circuit Court of Cook County appointed a commissioner to take bids in the

foreclosure sale of the Property in the Bankruptcy Court. (C613).

The appointment of a commissioner to conduct the sale was necessary because the Sheriff of Cook County, Illinois will only hold foreclosure sales at the Cook County courthouse. The Bankruptcy Court, however, required that the foreclosure sale of the debtor Partnership's sole asset be conducted under its observation.

The foreclosure sale took place on July 24, 1986. TRI was the only bidder at $10.4 million. (C829-832). On August 15, 1986, respondents and Lincoln jointly moved to confirm the sale. (C828). The sale was confirmed by the Illinois Circuit Court on September 3, 1986. (C982, C988).

Petitioner never appealed from any of the orders of the Bankruptcy Court or Illinois Circuit Court that authorized or confirmed the sale.

Petitioner first attempted to collaterally attack the sale on December 16, 1986 -- more than six months after the Foreclosure Order was entered and three months after the sale had been confirmed. Petitioner filed a petition to vacate the Illinois Circuit Court's order confirming the foreclosure sale and the foreclosure sale conducted by the commissioner. Petitioner argued that the sale was void because the agreed Foreclosure Order provided for a sale in a building owned by the United States. (Petition, App. 1, at A-3).

On January 15, 1987, after TRI resold the Property to a third party purchaser, petitioner abandoned his earlier grounds. Instead, petitioner claimed that the Foreclosure Order and the order confirming the sale were void because the Illinois constitution and local state court rules prohibited a commissioner from taking bids in a real estate foreclosure sale. (C1125).

On March 3, 1987, the Circuit Court of Cook County denied petitioner's amended motion to vacate. It held that Illinois law barred a collateral attack because its Foreclosure

Order was not void, had been entered with petitioner's consent, and had not been objected to until six months after its entry. (C1262).

On June 22, 1989, the Illinois Appellate Court, First District, Fourth Division, denied petitioner's appeal from the order rejecting petitioner's collateral attack. Petitioner argued that the Illinois Constitution and the rules of the Circuit Court prohibited the Circuit Court of Cook County from entering the Foreclosure Order because it provided for the sale of the Property by a commissioner. (Petition, App. 1, at A-3 to A-5; *See also* Appendix A attached hereto at A-2 to A-5).

The Illinois Appellate Court rejected these arguments because petitioner's collateral attack on the judgment of foreclosure was untimely, even if it did authorize a commissioner. (Petition, App. 1, at A-3 to A-4). The court also determined that the sale procedure was valid because it was authorized under the Bankruptcy Court's broad authority to sell a debtor's assets under the Bankruptcy Code. (Petition, app. 1, at A-5).

On or about July 17, 1989, petitioner unsuccessfully petitioned the Illinois Appellate Court for a rehearing. A copy of that petition is attached hereto as Appendix A. The petition for rehearing did not raise the issues set forth in the Petition to this Court or any other impropriety with the Bankruptcy Court's authorization of the sale procedure. (*See* A-2 to A-5 below). The petition for rehearing was denied on August 1, 1989.

On December 5, 1989, the Illinois Supreme Court denied petitioner's Petition for Leave to Appeal. A copy of that petition is attached hereto as Appendix B. Petitioner essentially restated his earlier grounds for appeal and did not raise the federal question stated in the Petition regarding the Bankruptcy Court's authorization of the sale. (*See* B-4 to B-6 below).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH FEDERAL DECISIONS.

Petitioner never demonstrates a conflict between the Illinois Appellate Court's decision and this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979) (*See* Petition at 8-10). Supreme Court Rule 10.1(c), however, limits review by a writ of certiorari to those cases "When a state court ... has decided an important question of federal law in a way that conflict with applicable decisions of this Court."

Despite petitioner's assertion that "this case falls squarely within the scope of Sup. Ct. R. [10.1(c)]", petitioner does not establish that the state court (i) decided a federal question, or (ii) contradicted this Court's precedent. (Petition at 8). The failure to establish *either* point is fatal to his petition.[1]

A. The Decision Below Is Based Upon Independent And Adequate State Law Grounds.

This Court should not review the decision of the Illinois Appellate Court because it does not turn on a federal question. It rests upon adequate and independent non-federal grounds, even if a federal questions also was decided. *See, e.g., Smith v. Smith*, 366 U.S. 210 (1961); *Wilson v. Loews Inc.*, 355 U.S. 597 (1958).

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[1]Although petitioner argues that Rule 10.1(c) (formerly Rule 17.1(c)) applies in this case, he demonstrates his own confusion regarding the requirements for a writ of certiorari by stating that the issue before this Court is whether "a state court, ... [may] suspend or nullify the state constitution, ... and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?" (Petition, Questions Presented). This issue falls squarely outside the ambit of Rule 10.1(c).

Review is particularly inappropriate here because the decision below rests on independent and adequate grounds of Illinois procedural and substantive law. *Henry v. Mississippi*, 379 U.S. 443, 446, *rehearing denied*, 380 U.S. 926 (1965). This Court will not entertain an appeal of the state court decision that is based upon well-established local procedural rules. *Wolfe v. North Carolina*, 364 U.S. 177, 192-93, *rehearing denied*, 364 U.S. 856 (1960). So long as there is no allegation that the state court based its decision on independent state procedural grounds as a means of avoiding a federal question, this Court will accept the state court decision whether right or wrong. *Id.* at 195; *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

This Court should decline to render the advisory opinion that petitioner requests. When a lower court's opinion rests upon independent and adequate state law grounds, any federal decision is peripheral to the lower court's decision. Thus, an opinion on the peripheral issue by this Court would only be an advisory opinion that would have no affect on the outcome of the underlying opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

In each of the prior appeals, the petitioner argued that the Foreclosure Order was void, and thus subject to collateral attack, because the sale of real estate pursuant to a judgment of foreclosure and sale entered by a Circuit Court requires that the property be sold by the Sheriff of Cook County. Petitioner based his assertion upon the Illinois Constitution's prohibition of fee officers in the judicial system and the local rules of the Circuit Court of Cook County. Ill. Ann. Stat., 1970 Const., Art. VI, 14; Circuit Court of Cook County, Illinois Rule No. 7.1(a). (Petition, App. 1, at A-4). Thus, petitioner contended that the Foreclosure Order was not voidable, but void due to a lack of statutory authority.

Whether the Foreclosure Order was void was *the critical issue in the state courts*. The Illinois Appellate Court affirmed the denial of the collateral attack on this ground. The court reasoned that "'[a]ny petition to vacate an order, judgment or decree filed more than 30 days after entry thereof, even though made to the court that rendered it, constitutes collateral

attack.'" (Petition, App. 1, at A-3, quoting *People v. O'Keefe*, 18 Ill. 2d 386, 164 N.E.2d 5, 9 (1960)).

The Illinois Appellate Court further held that the Foreclosure Order was not void because, under Illinois law, orders authorizing judicial sales are void only if the petitioner proves (i) fraud in procuring the sale, or (ii) the court's lack of personal or subject matter jurisdiction. (Petition, App. 1, at A-4).

The Illinois Appellate Court held that the Foreclosure Order was not void under either possible basis. First, petitioner never alleged fraud in the procurement of the order. (Petition, App. 1, at A-4). Second, the alleged lack of statutory authority to appoint a commissioner did not affect the personal or subject matter jurisdiction of the Circuit Court of Cook County. (Petition, App. 1, at A-4 to A-5).

Because the Foreclosure Order was not void, the Illinois Appellate Court affirmed the denial of petitioner's motion to vacate:

> We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order confirming the sale and voiding the commissioner's appointment.

(Petition, App. 1, at A-6).

The foregoing independent and adequate state law grounds for the decision below should bar the relief sought be petitioner. Illinois law and public policy promotes the certainty of judicial sales of real estate by severely limiting possible collateral attacks thereon. This Court should not interfere with that longstanding, sound policy -- even if the Illinois Appellate

Court decided, incorrectly, that federal law independently justified the result by authorizing the use of a commissioner of sale.

B. The Appellate Court's Decision Does Not Conflict With *Butner v. United States*

Petitioner also fails to meet the second requirement of Rule 10.1(c) -- a conflict between the state court's opinion and applicable decisions of this Court. The Illinois Appellate Court's decision does not conflict with the only decision cited by petitioner, *Butner v. United States*, 440 U.S. 48 (1979). Despite the petitioner's lengthy discussion of *Butner*, he never identifies an actual conflict between the Illinois Appellate Court's decision and *Butner*. (*See* Petition, at 8-10).

In fact, no conflict exists. *Butner* addressed the issue of the means of determining a mortgagee's ownership rights to rents from real property following the mortgagor's bankruptcy petition. 440 U.S. at 49 - 50. This Court held that ownership interests in real property are determined by the law of the state where the property is located:

> ... Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Id. at 55, 56.

The Illinois Appellate Court's decision had nothing to do with the existence or extent of the liens or interests in the Property. The Bankruptcy Court had already determined in the Agreed Order those issues with the agreement of all holders of those interests. The only issue determined below was the issue that petitioner raised -- whether, under Illinois law, the foreclosure judgment was void and petitioner's collateral attack was timely. Thus, the decision focused on the petitioner's failure to comply with Illinois procedural rules in

his belated attempt to collaterally attack the judgment of foreclosure. Whether a sheriff or a commissioner takes a bid -- to be confirmed by a judge -- does not "create" or "define" a property interest.

The brief reference to the Supremacy Clause of the United States Constitution in the Illinois Appellate Court's decision does not create a conflict with *Butner.* Indeed, the decision follows the discussion of the Supremacy Clause in *Butner.* The decision below states:

> ...Respondents are correct in their assertion that the agreed bankruptcy order supersedes the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner.
>
> '...Any such laws promulgated by the Congress operate to suspend any state law in conflict with them. ...' [citation omitted] We, therefore, find that the appointment of a commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances.

(Petition, App. 1, at A-5 to A-6).

Butner also discussed the Supremacy Clause using nearly the same terms: "'[I]t has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended.'" 440 U.S. at 54 n.9. (citing *Stellwagen v. Clum*, 245, U.S. 605, 613 (1918)).

Furthermore, the Illinois Appellate court correctly recognized the bankruptcy court's authority to establish the procedures for the sale of the principal asset of a debtor under the Bankruptcy Code. Numerous decisions validate the flexibility of the Bankruptcy Court in fashioning the procedures

for the sale of a debtor's assets under Sections 105 and 363 of the Bankruptcy Code, 11 U.S.C. Sections 105, 363. *See, e.g., In re Muscongus Bay Co.*, 597 F.2d 11 (1st Cir. 1979); *In re Brookfield Clothes, Inc.*, 31 B.R. 978 (S.D.N.Y. 1983); *In re Alves*, 52 B.R. 353 (Bankr. D.R.I. 1985). If, as here, the Bankruptcy Court wished to appoint a commissioner to take bids so that the court could observe the sale, it had ample authority to do so. Petitioner was given months to use whatever means it could to sell the Property. If it failed to do so, a commissioner's sale was specifically approved.

Even if a federal question was decided below, no writ of certiorari should issue because there no conflict exists between the decision below and a decision of this Court. Petitioner cannot satisfy the second requirement of Rule 10.1(c).

II. PETITIONER'S ISSUES DO NOT WARRANT REVIEW.

Even if petitioner could satisfy Rule 10.1(c), he does not raise any special and important reason to review the decision below. A writ of certiorari, which provides the manner of invoking this Court's appellate jurisdiction of state court judgments, "'is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.'" *Fay v. Noia*, 372 U.S. 391, 436 (1963).

A. The Petitioner Has Not Previously Raised The Issue Upon Which His Petition Is Based.

This Court should not consider whether the Illinois Appellate Court decided a question of federal law in conflict with *Butner* because petitioner never raised this issue in the state courts. (Appendix, at A-2 to A-5, B-4 to B-6). In his Petition for Rehearing before the Illinois Appellate Court, petitioner never asserted that the court's prior decision *even raised* a federal question -- let alone that the court had determined a federal question so as to conflict with a decision of this Court. Instead, petitioner argued that the court's decision

was a misapplication of both Illinois procedural and case law. (*See* A-2 to A-5 below).

Petitioner also ignored any federal law issue in his Petition for Leave to Appeal to the Illinois Supreme Court. Petitioner limited his argument to the Illinois procedural and case law that was the true basis for the Illinois Appellate Court's decision. (*See* B-4 to B-6 below). In seeking reversal of the decision below in the Illinois state courts, petitioner never cited or discussed *Butner* or any other federal case law.

This Court should invoke its well-founded policy not to review a decision to resolve issues not presented by the petitioner in the lower court from which the appeal is brought. *Illinois v. Gates*, 462 U.S. 213, 219, *rehearing denied*, 463 U.S. 1237 (1983). When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). "The Court has consistently refused to decide federal . . . issues raised here for the first time on review of state court decisions." *Id.* at 938. Thus, when the issue has not been appealed or argued before either the state appellate court or state supreme court, this Court will refuse to hear that issue. *Clark v. Jeter*, 486 U.S. 456 (1988) (Court will not review a state court decision where petitioner first raises a federal question on appeal to Supreme Court, after only asserting issues of state law before lower court); *Webb v. Webb*, 451 U.S. 493, 498 (1981) (certiorari petition dismissed because petitioner's briefs in state court did not raise federal issue, and instead argued state law issues).

The rule and its rationale apply here: "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Petitioner's failure to raise his so-called "federal law issue" resulted in a record that is inadequate with regard to whether the Illinois Appellate Court's decision is in conflict with *Butner*. *Cardinale*, 394 U.S. at 439. Therefore, this Court

should deny petitioner's request for a writ of certiorari. *Webb*, 451 U.S. at 498.

B. Any Federal Question is Moot.

Petitioner's issue became moot when the sale to TRI closed. In an oblique way, he challenges the Bankruptcy Court's Agreed Order, which modified the automatic stay, approved the appointment of a commissioner, and approved the form of the Foreclosure Order. Numerous cases decided under Section 363(m) of the Bankruptcy Code hold that appeals from the order approving a sale became moot once the sale closes. *See, e.g., In re Highway Truck Drivers & Helpers Local Union 107*, 888 F.2d 293 (3d Cir. 1989); *In re Royal Properties, Inc.*, 621 F.2d 984 (9th Cir. 1980).

Here, TRI purchased the Property and later resold it to an unrelated third party. If petitioner wanted to stop the sale, he should have sought a stay pending appeal and posted the multi-million dollar bond that would have been required. Section 363(m) strongly upholds federal judicial sales (much like the Illinois policy and law that barred petitioner's belated collateral attack). This Court should not undercut that policy by granting a writ to petitioner.

C. The Issue Is Not Important Because It Will Not Arise Again.

The repeal and replacement of the former Illinois mortgage foreclosure statute undercuts the importance of this case -- as well as petitioner's argument. Shortly after the foreclosure sale at issue here, Illinois repealed its former foreclosure statute and enacted a completely revised Illinois Mortgage Foreclosure Law. Ill. Rev. Stat., ch. 110, ¶¶ 15-1101 *et. seq.* (1987). One of the reforms of the new law permits a compensated officer of the court, or even a real estate broker, to perform the ministerial duty of selling real estate. Although not specifically applicable to the sale here, this reform was intended to conform the foreclosure process to the practices of the modern real estate market and to more regularly obtain a fair price. Ill. Rev. Stat., ch. 110, ¶ 15-1506(f)(14) (1987).

The new statute expressly validates the procedure used in this case. It allows persons other than the sheriff or a court to take bids, so long as the court confirms the sale. Paragraph 15-1506(f)(3) of the Statute states that a party may request that a judgment name "the official or other person who shall be the officer to conduct the sale . . ." ¶ 15-1506(f)(3). Under ¶ 15-1506(f)(6), the judgment of foreclosure may authorize "the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale." ¶ 15-1506(f)(6). In addition, ¶ 15-1506(f)(14) provides that the judgment can include "such other matters as approved by the court to ensure sale of the real estate for the most commercially favorable price for the type of real estate involved."

Under a long-standing policy of this Court, certiorari will not be granted if an issue is no longer a live one. If the statute upon which an alleged controversy rests has been amended or expired so that the issue will not arise in the future, certiorari will be denied. *See, e.g., United States. v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952).

The parties to the Bankruptcy Court's order should not be penalized for anticipating the new foreclosure statute. The Agreed Order and the new foreclosure statute allow the parties with interests in real estate to agree on the means to get the highest sale price -- without depending on courts or sheriffs to do the job of professional real estate brokers or auctioneers. Ill. Rev. Stat., ch. 110, ¶ 15-1506(g) (1987). The changes in the Illinois Mortgage Foreclosure Law also make the issue raised here unlikely to arise again. Certiorari clearly is unwarranted.

D. The Petitioner Lacks Standing And Alleges No Real Injury.

To obtain relief in this Court, a petitioner must demonstrate that the enforcement of the underlying state court judgment will deprive him, not another, of some right. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing*

Ass'n, 276 U.S. 71, 88 (1928). Thus, a party seeking review cannot invoke the jurisdiction of this Court to vindicate a right of a third party. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Furthermore, the petitioner "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, *rehearing denied*, 468 U.S. 1250 (1984).

In the present case, petitioner seeks to assert a right of a third party, and not a right of his own. The Property upon which respondents foreclosed was owned by the Trust. Neither the underlying state court foreclosure proceeding, nor the underlying bankruptcy proceeding of the Partnership, ever involved the petitioner in his personal capacity.

Petitioner improperly requests a writ of certiorari in his own name, not on behalf of the Partnership, *which twice stipulated to the sale procedure and directed the Trust, as owner of the Property to do so.*[2] Under Illinois law, a partnership must assert its rights in the name of all of its partners, not just the name of the general partner. *Excalibur Oil, Inc. v. Sullivan*, 659 F. Supp. 1539, 1540-41 n.1 (N.D. Ill. 1987); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1155-56 (N.D. Ill. 1983). Thus, petitioner's request for a writ is an attempt to assert a right of a third party, the Partnership, and should be denied.

Petitioner's request for a writ also should fail because petitioner suffered no personal injury that is likely to be redressed by the relief requested. *Allen*, 468 U.S. at 751. The Illinois Appellate Court so held: "... petitioner was not prejudiced by the appointment of the commissioner." (Petition,

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[2]Respondents believe that petitioner is estopped from collaterally attacking the sale procedure. As the sole general partner of the Partnership, only the petitioner could have authorized the Partnership's agreement to the sale procedure specified in the Agreed Order and the Foreclosure Order.

App. 1, at A-7). Assuming, *arguendo*, that an injury resulted from the lower court decision, that injury was suffered by the Trust, not the petitioner.[3]

Furthermore, any relief granted by this Court will not redress the alleged injury that resulted from the sale of the Property by the court-appointed commissioner. Petitioner requests that this Court vacate the Foreclosure Order and remove the case to the Illinois Appellate Court with instructions to rehear the case. (Petition at 15). As previously discussed in Section I.A. above, reversing the lower court as to any finding on a federal issue will not affect the ultimate outcome of this case. The Illinois Appellate Court's decision was based upon the petitioner's failure to comply with state procedural requirements. (*See supra* pp. 6-8). Any reversal by this Court on a federal issue will not act to cure the petitioner's procedural deficiencies, and the ultimate result will be the same as the previous decision by the lower court.

This Court should deny the relief requested by petitioner because it will not result in redress of the alleged injury, but only generate additional costs for the respondents that must be applied against the sale proceeds of the Property.

E. The Decision Below Was Intrinsically Fact Specific and Narrowly Drawn.

In upholding the Circuit Court's denial of the petitioner's motion to vacate, the Illinois Appellate Court rejected petitioner's collateral attack upon the Foreclosure Order. The court, after extensively discussing the background of this case, focused upon the underlying facts to deny petitioner's appeal:

> Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and peti-

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[3]The mortgage on the Property was nonrecourse, and therefor, the individual partners were not liable for the shortfall suffered by respondent when it later sold the Property.

> tioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition. ...

(Petition, App. 1, at A-6).

This Court should again refuse to exercise its certiorari jurisdiction to consider the fact specific matters raised by petitioner. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari), *citing United States v. Johnston*, 268 U.S. 220, 227 (1924) ("We do not grant certiorari to review evidence or discuss specific facts."); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (writ of certiorari presenting primarily a question of fact dismissed as improvidently granted).

CONCLUSION

For the reasons stated herein, the Petition of Wayne P. Jackson for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 5, 1990

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT, FOURTH DIVISION

Trustee of Central States, Southeast and Southwest Areas Pension Fund	)	Appeal from the Circuit Court of Cook County Illinois, County Department, Chancery Division
Plaintiff-Appellee,	)	
vs.	)	No. 86 CH 73
LaSalle National Bank, as Trustee Under Trust Agreement dated 12/18/75 and known as Trust No. 21599, et al.,	)	
Defendants-Appellant.	)	The Honorable Judge Thomas O'Brien, presiding.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING

Appellant Wayne Jackson, petitions this Appellate Court for a rehearing of its decision rendered on June 22, 1989, wherein the trial court's denial of Appellant's Amended Petition to Void the Judicial Sale was affirmed. The Petitioner

submits that this court misapprehended critical factual matters and misapplied Illinois law to the substance of his appeal.

At no time during the pendency of the mortgage foreclosure proceeding in the trial court, did the Petitioner/Appellant Wayne Jackson appear, participate, or consent to the entry of any agreed order or Judgment. The Petitioner did not participate in the trial court proceedings until he filed his Petition to Void a portion of the Judgment of Foreclosure regarding his attack on the trial court's lack of authority to conduct the judicial sale as designated within the terms of the judgment. At no time, did the Petitioner/Appellant consent to any order including an order confirming the Judicial sale referred to by this Appellate Court in the first paragraph of page 7 of its opinion.

An attack alleging that a judicial sale is void can be made based on the court's lack of subject matter jurisdiction which includes the trial court's transcending of its authority, if it is solely statutorily based. Petitioner contends that this Appellate Court misapprehended his argument when he asserted that the trial court lacked any statutory authority to appoint a commissioner for the purpose of conducting the sale. The provision of the Illinois Constitution specifically excludes the judiciary from considering as part of its inherent power any ability for appointing fee officers in the judicial system. The court, constitutionally prohibited from considering as part of its inherent power an authority to appoint fee officers, must search for legislative statutory authority to support the appointment. The only statutory authority for the conduct of a judicial sale for a foreclosure proceedings by a person other than the trial court Judge in Cook County, Illinois, is found in the Circuit Court Rules of Cook County authorizing the Sheriff of Cook County to conduct the sale.

Although the trial court Judge has subject matter jurisdiction to render a judgment in a mortgage foreclosure action, as presented by the case at bar, he transcended his subject matter jurisdiction when he made an appointment of a fee officer, a special commissioner, to conduct the judicial sale.

That portion of the judgment order in error is void and not voidable.

This court's reference to Illinois case law regarding the appointment of special commissioners is a misapplication of Illinois law to the instant case. In the cases cited within this court's opinion, each case refers to an appointment of a special commissioner during a period of time when Illinois courts were empowered to reference matters to either masters in chancery or to special commissioners. Referencing by the judiciary, is no longer available by Illinois statutory law nor by the Illinois Constitution. There is no provision within the Illinois Mortgage Foreclosure Act, the Judgment Act, nor the Illinois Code of Civil Procedure for referencing by the trial court Judge of a judicial sale to a commissioner. The trial court Judge lacked the power to decree that portion of its Judgment Order.

There are several Illinois decisions regarding the propriety of reference. In 1955, the Illinois Appellate Court held in Smallwood v. Soutter, 5 Ill. App. 2, 303 (1st Dist., 2nd Div., 1955) 309 that:

> "The law in this State is that there can properly be no reference to a special or other assistant to a court in a chancery proceeding except as authorized by statute. (citations omitted) There is no other procedure which defines the responsibilities of any other persons as assistants or officers of the court with the authority to administer oaths to witnesses, and otherwise perform the duties of a master or other statutory officer in matters of chancery reference. (citations omitted)
>
> The court's have no power to delegate any of their duties unless clearly authorized by law."

This Appellate Court applying the decision of Stark v. Stark, 7 Ill. App. 2, 442, used Illinois law during a time when referencing masters in chancery or special commissioners were not

prohibited. Illinois Courts of chancery no longer have the authority to reference matters as discussed in the Stark decision. In the Illinois decision of Mullaney, Wells, & Co. vs. Savage, 31 Ill. App. 3d, 343 (1st Dist., 5th Div., 1975) the referencing to a special commissioner was salvaged as a continuation of the court's original proper authority to appoint a master in chancery. This appointment was originally made in a case filed in 1963. Although the masters in chancery term expired and the law in Illinois changed after the filing of the case, the appointment was held proper as a matter of continuing jurisdiction of the court. This decision held that ". . . defects in subject matter jurisdiction may not be waived . . ., because the parties by their consent cannot confer upon a court a power which it does not possess." Mullaney, *supra*., 347.

Although the Appellate Court is correct in respect to the bankruptcy court's powers and authority, nowhere in 11 U.S.C.A. §105(a) (West Supp. 1989) can the bankruptcy court expand the powers of a state trial court for the appointment of a commissioner when the state constitution has the prohibitive language regarding the appointment of fee officers by the judiciary. The bankruptcy court in the case at bar could have properly supervised the judicial sale by causing the appropriate officer of the Sheriff of Cook County, Illinois, to conduct the sale in the presence of the bankruptcy court.

The Appellant has always contended that the judicial sale as ordered by the trial court was void. The Appellant further contends that he has complied with the requisite procedure to collaterally attack a judgment void in part. The Appellant never sought to have the order confirming the judicial sale vacated on any equitable grounds or on any other grounds other than on the basis that part of the judgment was void. The Appellant need not show diligence. An attack on a void judgment may be made by Section 2-1401 Petition (formerly known as Section 72 of the Illinois Civil Practice Act) without showing either due diligence or meritorious defense. LaMotte vs. Constantine, 92 Ill. App. 3d, 216 (1st Dist., 1st Div., 1980). A request to vacate a void order *may* be made at any time and a lapse of time is not a criteria for that deter-

mination. Klehm vs. M. Suson & Assoc. Inc., 22 Ill. App. 3d, 346 (1st Dist., 4th Div., 1974).

CONCLUSION

For all of the reasons stated above, this Court should rehear and reconsider its decision affirming the trial court Judge's Order denying Wayne Jackson's Amended Petition.

Respectfully submitted,

RONALD GERTZMAN

By:_____
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No. _____

IN THE
SUPREME COURT OF ILLINOIS

Trustee of Central States, Southeast and Southwest Areas Pension Fund Plaintiff-Respondent, vs. LaSalle National Bank, as Trustee Under Trust Agreement dated 12/18/75 and known as Trust No. 21599, et al., Defendants, and Wayne Jackson, Defendant-Petitioner.	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 87-1339 _____ There Heard on Appeal from the Circuit Court of Cook County, Illinois. No: 86 CH 73 _____ Honorable Thomas O'Brien Judge Presiding

PETITION FOR LEAVE TO APPEAL

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Attorney for *Defendant-Petitioner*
WAYNE JACKSON

The defendant-petitioner, Wayne Jackson, respectfully petitions this Court for leave to appeal from the Judgment of the Appellate Court of Illinois, First District.

JUDGMENT BELOW

The Appellate Court entered its judgment in this case on June 22, 1989. Wayne Jackson, defendant-petitioner, filed a Petition for Rehearing on July 13, 1989. The Appellate Court denied the Petition for Rehearing on August 1, 1989.

POINTS RELIED UPON FOR REVERSAL

1. The State of Illinois Constitution of 1970 provides, in part, at Article VI, §14, that: "There shall be no fee officers in the judicial system." The petitioner collaterally attacked, as void, a portion of the trial court's judgment of foreclosure and sale which provided for the sale to be conducted by a commissioner appointed by the trial court. The Appellate Court did not void that portion of the judgment order, based on:

(a) A state court referencing a chancery matter to a special commissioner is, at most, voidable.

(b) The agreed bankruptcy order supervisionally reviewed by the Federal Bankruptcy Court validates the appointment of a commissioner, even if prohibited by the Illinois Constitution.

(c) A Federal Bankruptcy Court may order a state court to enter a judgment containing a Constitutionally prohibited appointment in order to enforce the provisions of the bankruptcy court.

(d) An agreed bankruptcy order supersedes applicable state law irrespective of the impropriety of a state court appointing a fee officer.

2. The Appellate Court failed to recognize an exception, recognized by the Illinois Supreme Court, to the general rule that a judgment entered by a court with subject matter jurisdiction cannot be collaterally attacked. The

exception provides that where a court exceed its jurisdiction and its judgment transcends the law and exceeds its jurisdictional limits the judgment or that portion of the judgment is void.

STATEMENT OF FACT

On January 3, 1986, a mortgage foreclosure action was filed by the respondents, Trustees of Central States Southeast and Southwest Areas Pension Fund (the "Fund"). Appellee Johnstown/Consolidated Realty Trust ("JCRT") counterclaimed seeking foreclosure of its third mortgage lien. Numerous parties including two land trusts (owners of the land and severed building) along with "Unknown Owners and Non-Record Claimants" were made Defendants.

A partnership with an interest in the subject property filed a Chapter 11 Bankruptcy proceeding on February 13, 1986. The automatic stay was modified by an Agreed Order entered on April 28, 1986, by several of the Defendants participating in the bankruptcy proceedings. An agreed order of foreclosure for entry by the trial court was made an exhibit to the agreed bankruptcy order.

On June 13, 1986, the trial court entered the agreed foreclosure decree. The agreed foreclosure decree provided for a commissioner to be appointed by the trial court to sell the subject property in Judge Eisen's bankruptcy courtroom on July 24, 1986. The counter-plaintiff JCRT was the successful bidder at $10.4 billion, subject to $3.5 million of unpaid real estate taxes and a second mortgage lien. The trial court confirmed the results of the sale on September 3, 1986.

The petitioner Wayne Jackson, an unnamed Defendant with an interest in the subject property and included within the designation of defendants "Unknown Owners," filed a petition to void the commissioner's sale on December 16, 1986, and an Amended Petition on January 15, 1987, asserting that this Court lacked authority to appoint the commissioner and that the sale was void. During the pendency of Jackson's Petition, JCRT sold the property on December 23, 1986, even though the record of this proceeding disclosed the void part of the judgment order appointing a commissioner to conduct the sale.

On March 31, 1987, the trial court denied Jackson's Amended Petition to void a portion of the agreed foreclosure decree.

ARGUMENT

A court has inherent powers to carry out its judicial purposes. Its inherent powers are limited by the prohibitions established within the Constitution conferring it its judicial powers.

The State of Illinois Constitution of 1970 provides a specific prohibition that: "There shall be no fee officers in the judicial system." Article VI, Sec. 14, of the Illinois Constitution of 1970, S.H.A. There have been no Illinois Supreme Court decisions regarding this prohibition of the judiciary. However, the Illinois Appellate Court, First Judicial District found this prohibition: ". . . aimed primarily at abolition of the office of master in chancery." Factor v. Factor, 27 Ill. App. 3d 594, 327 N.E. 2d 386 (First Dist., First Div., 1975). Justice Goldberg was unable to find any justification for a violation of this constitutional provision with its meaning clear and plain. He found a commissioner to be a fee officer within the judicial system in the Factor case, which was, however, a direct appeal.

The general rule of law provides for a collateral attack of a judgment only when the court lacked subject matter jurisdiction or jurisdiction over the person. Without these jurisdictional defects, no collateral attack can be made to void a judgment of the court no matter how erroneously entered. This Illinois Supreme Court has established an exception to this general rule of law which provides that a judgment or a portion of the judgment can be collaterally attacked and determined void, if the court has exceeded its authority and transcended the law or statute.

In a foreclosure action, this Court found it essential to a valid judgment that the Court possess the property jurisdiction to render the judgment. The Court's decree can be voided, even when the Court possessed subject matter jurisdiction, if the court exceeded its jurisdiction. Any sale resulting from the Court's transgression of the law results in the sale being an absolute nullity. Armstrong v. Obucino, 300 Ill. 140 (1921).

The Supreme Court's stated exception was reasserted in The People vs. Alfano, 386 Ill. 578 (1944) which found that any portion of the judgment in excess of the Court's jurisdiction is void, without effecting the valid portion of the judgment. A court lacking subject matter jurisdiction cannot by consent have that jurisdiction conferred to it and a judgment entered by a court lacking the jurisdiction or power to enter the judgment is void. Toman v. Park Castles Apr. Bldg. Corp., 375 Ill. 293.

The Appellate Court's opinion infers that the Federal Bankruptcy Court has the power to cause a state court to enter a judgment order which it would otherwise be prohibited by state constitution from entering. The various references by the Appellate court to 11 U.S.C.A. §105(a) (West Supp. 1989) and Article I, section 8 of the United States Constitution do not provide persuasive authority. A bankruptcy court no longer is empowered to appoint anyone but a designated trustee of the United States Trustee's Office for the purpose of conducting a sale in a bankruptcy proceedings. No citation is given wherein a bankruptcy court can instill a state court with power that is otherwise prohibited by its state's constitution. This apparent authority of the bankruptcy court could establish an unusual and unpredictable precedent if allowed to remain unchallenged.

CONCLUSION

The Appellate Court's opinion found the appointment of a commissioner by the Trial Court Judge to be at most a voidable appointment. The clarity of the relevant language of the Constitution requires no construction. It is further believed that referencing to either masters in chancery or to special commissioners is no longer the law of the jurisdiction. If, however, the Appellate Court's opinion is allowed to remain the law of this jurisdiction, future appointments of fee officers by the courts will not be totally prohibited, but merely treated as erroneous rulings of the courts. The clear purpose of the framers of the 1970 State of Illinois Constitution prohibiting fee officers will be substantially modified and diluted to merely

a voidable appointment rather than a void appointment. This Court should assure the clarity of this prohibition.

Respectfully submitted,

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